Supreme Court, U.S.
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No. 94-1342

In The

Supreme Court of the United States

October Term, 1994

GUILIO J. CONTI AND EDITH CONTI,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The Sixth Circuit Court Of Appeals

BRIEF IN REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT B. PIERCE
PAUL T. MENGEL
PIERCE & PIERCE, P.C.
255 S. Woodward Ave.
Suite 205
Birmingham, MI 48009
(810) 647-0404

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BRIEF IN REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT

This case is another example of why the public, many members of the bar and politicians are fed up with the income tax administration and thus are proposing drastic changes. Contrary to truth and fundamental tax law principles, the IRS has taxed alleged unreported income in the wrong years and to the wrong taxpayers. The lower Court relieves itself of responsibility by bundling its opinion in language palatable to the bar. In short, the Tax Court and the Sixth Circuit, having determined that Taxpayers can have no defense to an arbitrary net worth determination by the IRS, must exclude polygraph results. If the polygraph results were admitted, then the truth of the defense would have to be confronted.

ARGUMENT

With regard to Respondent's brief, Petitioners submit that the Court should **strongly** consider the following:

1) The Respondent's argument assumes that *"unilateral"* polygraphs do not cause stress and their results are unreliable. In fact, it is an assumption that the Sixth Circuit has made and it is totally in error. The opinions of the Tax Court and the Sixth Circuit not only accept this assumption as true but have ruled that they will not even hear any expert opinion that is contrary. Federal Rule of Evidence 702 does not provide that Courts may unilaterally declare certain scientific facts incontrovertible.

The Federal Courts, pursuant to the Federal Rules of Evidence, have a duty to try to determine the truth. It is inappropriate for them to enshrine certain alleged propositions as dogma irrefutable by any evidence.

2) Respondent's argument with respect to rule 608(b), Federal Rules of Evidence is completely new. Such argument was not advanced in the Tax Court or the Sixth Circuit. Moreover, the District Court upon remand in *United States v. Piccinonna*, 729 F. Supp. 1336 (S.D.Fla. 1990), based its decision on two grounds, one of which the Respondent has seen fit to omit. The District Court first ruled that the polygraph questions asked in that case were irrelevant. There is no suggestion in this case that the questions asked the Contis were not the very questions at the center of the case being litigated. That the Eleventh Circuit affirmed the case, per curiam, without discussion, does not imply any approval of the lower court's 608(b) argument, *United States v. Piccinonna*, 925 F.2d 1474 (11th Cir.1991).

3) The Respondent argues that "prejudicial and confusing" polygraph evidence need not be admitted as if there had been some finding by some court that the polygraph evidence was prejudicial and confusing. In fact, both courts ruled that polygraph evidence was inadmissible per se. In fact, the government has argued throughout that all polygraphs are per se inadmissible regardless of how relevant or how expertly done and regardless of what any expert chooses to say about them. There has been no negative finding by any court about the tests in this case. There have been no findings at all, except to rule them beyond the pale. None of the things

that the Government argues that a court has discretion to do, once it has carefully considered polygraph evidence, can occur in this case, because no court has ever considered the polygraph evidence, carefully or otherwise. Petitioners do not argue that the Tax Court abused its discretion. Petitioners argued and have clearly proven that the Tax Court did not exercise its discretion at all. The government cannot list a collection of perfectly acceptable negative results a court could have reached in applying its discretion as to whether to admit evidence as a substitute for the actual exercise of such discretion. It is the same as to argue that a Court that has decreed a defendant guilty without having heard any of the evidence is justified because, after hearing the evidence, it would have had the right to find the Defendant guilty anyway.

CONCLUSION

The lower courts seem so blinded by a prejudice against polygraphs that they have been willing to accept any leap of logic that is necessary to justify continuing per se exclusion. However, the fact is that properly conducted polygraph tests, like all other technologically based evidence, are an assistance to the trier of fact and should be admissible in court, particularly to protect parties who have little other defense against the skepticism of authority. In this case, Taxpayers have been subjected to an entirely imaginary reconstruction of net worth and have the burden of proving a negative (that they did not have unreported imcome). Under these circumstances, their only hope was the polygraph. To

exclude it would be to determine that the IRS' judgment cannot be questioned in situations where documentary evidence is unavailable. This Court should not remove what could be Taxpayers' sole defense against the arbitrary fiat of an agency that has become a law unto itself. Certiorari should be granted.

Respectfully submitted,

ROBERT B. PIERCE
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PIERCE & PIERCE, P.C.
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Suite 205
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